OCT 27 2005

Nos. 04-1203 and 04-1236

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF GEORGIA, ET AL.

TONY GOODMAN, PETITIONER

v.

STATE OF GEORGIA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER IN NO. 04-1203

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

A. Prison administration is the relevant context 1
B. Title II responds to a long history and a continuing problem of unconstitutional treatment of disabled prisoners 2
1. *Lane* held that Section 5 legislation is warranted 3
2. The record is substantial 4
3. The type of violation warrants congressional action 13
4. Title II is not underinclusive 15
C. Title II is reasonably tailored to remedying and preventing constitutional violations in the prison context 16
Reply Appendix 1a

TABLE OF AUTHORITIES

Cases:

Alabama v. *United States*, 304 F.2d 583 (1st Cir.), aff'd, 371 U.S. 37 (1962) 8

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) 10

Anderson v. *Martin*, 375 U.S. 399 (1964) 8

Armstrong v. *Davis*, No. 99-15152, 2000 WL 369622 (9th Cir. Apr. 11, 2003) 18

Ashwander v. *Tennessee Valley Auth.*, 297 U.S. 288 (1936) 18

Barnes v. *Gorman*, 536 U.S. 181 (2002) 20

Baskin v. *Brown*, 174 F.2d 391 (9th Cir. 1949) 8

Beckford v. *Irvin*, 49 F. Supp. 2d 170 (W.D.N.Y. 1999) 11

Cases—Continued Page

Benten v. *Kessler*, 505 U.S. 1084 (1992) 10

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 20

Bliley v. *West*, 42 F.3d 101 (4th Cir. 1930) 8

Board of Trs. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001) 5, 7

Bowman v. *Beasley*, 8 Fed. Appx. 175 (10th Cir. 2001), cert. denied, 535 U.S. 1001 (2002) 18

Brooks v. *Horn*, No. Civ.A. 00-03637, 2004 WL 764385 (E.D. Pa. Apr. 7, 2004) 18

Buck v. *Bell*, 274 U.S. 200 (1927) 8

Butler v. *Thompson*, 184 F.2d 526 (4th Cir. 1950) 8

Carrington v. *Rash*, 380 U.S. 89 (1965) 8

Chapman v. *King*, 154 F.2d 460 (5th Cir.), cert. denied, 327 U.S. 800 (1946) 8

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 6

City of Cleburne v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) 4

City of Rome v. *United States*, 446 U.S. 156 (1980) 10

Couvillion v. *Michigan Parole Bd.*, No. 4:04-CV-130, 2005 WL 1036973 (W.D. Mich. May 4, 2005) 18

Cutter v. *Wilkinson*, 125 S. Ct. 2113 (2005) 14, 18, 19

Davis v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.), aff'd, 336 U.S. 933 (1949) 8

DeShaney v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) 18

Cases—Continued Page

Dred Scott v. *Sandford*, 60 U.S. (19 How.) 393 (1856) 10
Drueding v. *Devlin*, 380 U.S. 125 (1965) 8
Farmer v. *Brennan*, 511 U.S. 825 (1994) 17
Gates v. *Rowland*, 39 F.2d 1439 (9th Cir. 1994) 18
Guinn v. *United States*, 238 U.S. 347 (1915) 8
Hamm v. *Virginia State Bd. of Elections*, 230 F. Supp. 156 (E.D. Va.), aff'd, 379 U.S. 19 (1964) 8
Harrelson v. *Elmore County*, 859 F. Supp. 1465 (M.D. Ala. 1994) 11
Harris v. *United States*, 536 U.S. 545 (2002) 18
Hicks v. *Frey*, 992 F.2d 1450 (6th Cir. 1993) 11
Johnson v. *California*, 125 S. Ct. 1141 (2005) 14, 18
Kimel v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) 16
Lane v. *Wilson*, 307 U.S. 268 (1939) 8
Lassiter v. *Northampton County Bd. of Elections*, 360 U.S. 45 (1959) 8
Lewis v. *Casey*, 518 U.S. 343 (1996) 13
Lopez v. *Monterey County*, 525 U.S. 266 (1999) 10
McCardle, Ex parte, 74 U.S. (7 Wall.) 506 (1869) ... 10
McDonald v. *Key*, 224 F.2d 608 (10th Cir.), cert. denied, 350 U.S. 895 (1955) 8
McKune v. *Lile*, 536 U.S. 24 (2002) 16
Miller v. *King*, 384 F.3d 1248 (11th Cir. 2004) 2, 5
Myers v. *Anderson*, 238 U.S. 368 (1915) 8

Cases—Continued Page

Navedo v. *Maloney*, 172 F. Supp. 2d 276 (D. Mass. 2001) 11

Nevada Dep't of Human Res. v. *Hibbs*, 538 U.S. 721 (2003) ..... *passim*

Nixon v. *Condon*, 286 U.S. 73 (1932) 8

Nixon v. *Herndon*, 273 U.S. 536 (1927) 8

Oneisha v. *Hopper*, 171 F.3d 1289 (11th Cir. 1999), cert. denied, 528 U.S. 1114 (2000) 18

Oregon v. *Mitchell*, 400 U.S. 112 (1970) 8

Parkinson v. *Columbia County Dist. Att'y*, 679 N.Y.S.2d 505 (Sup. Ct. 1998) 11

Pennsylvania Dep't of Corrs. v. *Yeskey*, 524 U.S. 206 (1998) 4, 16

Randolph v. *Rodgers*, 170 F.3d 850 (8th Cir. 1999) 18

Reed v. *Reed*, 404 U.S. 71 (1971) 9

Rice v. *Elmore*, 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948) 8

Rostker v. *Goldberg*, 453 U.S. 57 (1981) 7

Schmidt v. *Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) 11

Serrano v. *Francis*, 345 F.3d 1071 (9th Cir. 2003), cert. denied, 125 S. Ct. 43 (2004) 11

Smith v. *Allwright*, 321 U.S. 649 (1944) 8

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 5, 6, 8

Spicer v. *Virginia, Dep't of Corrs.*, 66 F.3d 705 (4th Cir. 1995) 11

Tennessee v. *Lane*, 541 U.S. 509 (2004) ..... *passim*

Terry v. *Adams*, 345 U.S. 461 (1963) 8

Cases—Continued Page

Thorn v. *Richardson*, No. 9577, 1971 WL 201 (W.D. Wash. Dec. 10, 1971) 9
Turner v. *Safley*, 482 U.S. 78 (1987) 13, 14, 17
United States v. *Gainey*, 380 U.S. 63 (1965) 5
United States v. *Louisiana*, 225 F. Supp. 353 (E.D. La. 1963), aff'd, 380 U.S. 145 (1965) 8
United States v. *Raines*, 362 U.S. 17 (1960) 3
United States v. *Virginia*, 518 U.S. 515 (1996) 7, 9
Virginia, Ex parte, 100 U.S. 339 (1879) 10
Weeks v. *Chaboudy*, 984 F.2d 185 (6th Cir. 1993) ... 11
Wilkinson v. *Austin*, 125 S. Ct. 2384 (2005) 17

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8 (Commerce Clause) 5
Amend. VIII 1, 11, 14, 15, 16
Amend. XIV:
§ 1 6
§ 5 ..... *passim*
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* 7, 12
42 U.S.C. 12101(a)(3) 3, 4, 16
42 U.S.C. 12111-12117 (Title I) 5
42 U.S.C. 12131-12165 (Title II) ..... *passim*
42 U.S.C. 12131(2) 17
42 U.S.C. 12132 ..... 14, 17
42 U.S.C. 12134(16) 18
Civil Rights of Institutionalized Persons Act, 42 U.S.C.1997 *et seq.* 4

Statutes and regulations—Continued

	Page
42 U.S.C. 1997(1)(B)(ii)	4
42 U.S.C. 1997(2)(B)(iii)	4
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103	8
Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*	6, 20
Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e	19
Rehabilitation Act, 29 U.S.C. 701 *et seq.*	18, 20
29 U.S.C. 701(a)(5)	4
29 U.S.C. 794 (2000 & Supp. 2002)	18
Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc *et seq.*	19
42 U.S.C. 2000cc-1(a)	4
42 U.S.C. 2000cc-1(a)(1)	19
42 U.S.C. 2000cc-1(a)(2)	19
20 U.S.C. 6421(a)(2) (2000 & Supp. II 2002)	4
20 U.S.C. 6421(a)(3) (2000 & Supp. II 2002)	4
29 U.S.C. 701(a)(5)	4
42 U.S.C. 5633(a)(9)(A) (2000 & Supp. II 2002)	4
42 U.S.C. 5633(a)(9)(F)(i) (2000 & Supp. II 2002)	4
Mass. Gen. Laws Ann. ch. 123 (West 2003):	
§ 1	11
§ 13	11
§ 14	11
§ 18	11
28 C.F.R.:	
Section 35.130(b)(7)	17
Section 35.150(a)(3)	17

Miscellaneous:

	Page
AIDS and the Admin.of Justice: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin.of Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. (1987)	12
Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm.on the Judiciary, 95th Cong., 1st Sess. (1977)	12
Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977)	13, 15
118 Cong. Rec. (1972):	
p. 1412	9
p. 1816	9
pp. 1816-1819	9
p. 1840	9
p. 4973	9
136 Cong. Rec. 17,039 (1990)	13
Equal Employment Opportunities Enforcement Act: Hearings on S. 2453 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 91st Cong., 1st Sess. (1969)	9
Equal Employment Opportunities Enforcement Act of 1971: Hearings on S. 2515, S. 2617 & H.R. 1746 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess. (1971)	19

Miscellaneous—Continued: Page

Equal Employment Opportunity Enforcement Procedures: Hearings on H.R. 1746 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 1st Sess. (1971) 9

Equal Employment Opportunity Enforcement Procedures: Hearings on H.R. 6228 & 13517 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 91st Cong., 1st & 2d Sess. (1969-1970) 9

Robert D. Fleischner & Michael Cutler, *Annotated List of Cases Relating to Treatment for Persons with Mental Illness in Prisons and Jails* (Dec. 2002), at <http://www.centerforpublicrep.org/cgi-bin/pdf.pl?id=97283> 4

FY 2004 Office of Justice Programs, Office on Violence Against Women and Office of Community Oriented Policing Services Grants by State (visited Oct. 26, 2005) <http://www.ojp.gov/Fy2004grants> 19

H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971) 9

H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 3, (1990) 12

Kentucky Legis. Research Comm'n, *Research Report No. 125: Mentally Retarded Offenders in Adult and Juvenile Correctional Institutions* (1975) 11

Miscellaneous—Continued: Page

John Monahan et al., "Prisoners Transferred to Mental Hospitals," in *Mentally Disordered Offenders: Perspectives from Law and Social Science* (John Monahan & Henry J. Steadman eds., 1983) 11

Cathy Polter, Correctional Ass'n of N.Y., *State of The Prisons: Conditions Inside the Walls* (1986) 12

S. Rep. No. 415, 92d Cong., 1st Sess. (1971) 9

In the Supreme Court of the United States

No. 04-1203

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF GEORGIA, ET AL.

No. 04-1236

TONY GOODMAN, PETITIONER

v.

STATE OF GEORGIA, ET AL.

REPLY BRIEF FOR THE PETITIONER IN NO. 04-1203

Neither respondents nor their amici ask this Court to overrule its recent decisions in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), and *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003). But, as evidenced by respondents' heavy reliance (Br. 29, 32, 34, 35, 37-38 n.10) on the *dissenting* opinions in those cases, this Court's *holdings* in *Lane* and *Hibbs* establish that Congress properly exercised its power under Section 5 of the Fourteenth Amendment to apply Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131-12165, to prisons.

A. Prison Administration Is The Relevant Context

The as-applied analysis of Congress's Section 5 power that was prescribed by this Court in *Lane*, 541 U.S. at 530-534, properly focuses on the "class of cases" and "variety of * * * constitutional guarantees" implicated by the States' "administration of * * * the penal system." *Id.* at 522, 525, 531. Neither respondents nor their amici make any effort to defend the court of appeals' much narrower focus on the particular constitutional claim (the Eighth Amendment) that happened to be asserted in the first case that

court decided involving prison administration. *Miller* v. *King*, 384 F.3d 1248, 1272 (11th Cir. 2004); Pet. App. 19a. And with good reason: *Lane* made clear that the relevant context for its as-applied analysis was not the individual constitutional claim raised in the complaint—the complaints in *Lane* raised no constitutional claims at all, Pet. App. 12-28 (No. 02-1667)—but rather the entire "class of cases implicating the accessibility of judicial services." 541 U.S. at 531. Moreover, the Court considered the *full* range of constitutional concerns relevant to that entire substantive category of governmental activity, including those not implicated by the plaintiffs' own claims, such as the constitutional interest in access to the courts by civil litigants and jurors. That approach recognizes that Section 5 legislation (i) responds to and addresses not the isolated claims of future litigants, but broad "pattern[s]" of unconstitutional conduct by government officials in the substantive areas in which they operate, *Lane*, 541 U.S. at 526, and (ii) may prophylactically "proscribe[] facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Hibbs*, 538 U.S. at 727-728. See U.S. Br. 11-16.[1]

B. Title II Responds To A Long History And A Continuing Problem Of Unconstitutional Treatment Of Disabled Prisoners

Respondents' central argument (Br. 22-38) is that Congress lacked an adequate record of unconstitutional treatment of prisoners to apply Title II to the prison context. That is wrong for four reasons.

1. ***Lane held that Section 5 legislation is warranted.*** The short answer is that this Court held in *Lane* that the constitutional predicate for Congress's enactment of Title II as Section 5 legislation is "clear beyond peradventure."

---

[1] Even if a narrower context were appropriate, respondents and their amici offer no response to the United States' alternative argument (Br. 47-48) that, at a minimum, Title II is constitutional as applied to Goodman's allegations concerning actual violations of the Constitution (see Pet. App. 16a-18a).

541 U.S. at 529. In *Lane*, this Court surveyed a broad array of evidence beyond the context of access to the courts to support its determination that Congress passed Title II in response to an established record "of pervasive unequal treatment [of individuals with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 524; see *id.* at 524-526 (discussing the history and evidence of discrimination in, *inter alia*, voting, marriage, unjust commitment and institutionalization, public education, and the penal system). The Court then concluded that "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities," *id.* at 528, combined with Congress's express findings of discrimination in areas that are the exclusive or predominant domain of state governments, *id.* at 529; see 42 U.S.C. 12101(a)(3), "make[] clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *Lane*, 541 U.S. at 529. It was only in the next step of the Court's Section 5 analysis—a separately designated section of the opinion assessing whether "Title II is an appropriate response to this history and pattern of unequal treatment," *id.* at 541 U.S. at 530—that the Court even discussed an as-applied approach or precedents like *United States* v. *Raines*, 362 U.S. 17 (1960). The Court then restricted "the scope of that inquiry," *Lane*, 541 U.S. 530, to the context of access to the courts; *id.* at 530-531.

Respondents contend (Br. 20-21) that neither Congress nor this Court focused on the prison context. Quite the opposite, *Lane* concluded that the "pattern of unequal treatment" identified by Congress includes "administration of * * * the penal system," 541 U.S. at 525, and cited prison cases that documented that pattern, *id.* at 525 n.11. Congress also specifically found that "institutionalization" was

one "critical area[]" in which "discrimination * * * persists." 42 U.S.C. 12101(a)(3). That targeted finding can naturally "be thought to include penal institutions." *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212 (1998). Indeed, Congress employed the same terminology in the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, where it defined the "institutions" that house "institutionalized persons" to include a State or local "jail, prison, or other correctional facility," or "a pretrial detention facility," 42 U.S.C. 1997(1)(B)(ii), (iii), and Subch. I-A (title).[2]

2. ***The record is substantial.*** Even were the Court to re-open *Lane*'s holding concerning the predicate for Congress's exercise of its Section 5 power, ample evidence corroborates the appropriateness of applying Title II to prisons. See U.S. Br. 16-35; Goodman Br. 20-36; Paralyzed Veterans Br. 7-13; ADAPT Br. 9-22; American Ass'n on Mental Retardation Br. 15-20. Notably, while respondents criticize various pieces of evidence, they do not actually deny the *reality* of the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities, *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 438 (1985), nor could they. U.S. Br. 16-17 & n.8. Nor do they deny the *reality* that Congress and the courts have, time and again, documented the unconstitutional treatment of disabled prisoners. See, *e.g.*, U.S. Br. 24-32 & Add. A; see also R. Fleischner & M. Cutler, *Annotated List of Cases Relating to Treatment for Persons with Mental Illness in Prisons & Jails* (Dec. 2002), at <http://www.centerforpublicrep. org/cgi-bin/pdf.pl?id=97283>. Instead, respondents proffer a series of rules that would force this

---

[2] See Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc-1(a) (same definition); 20 U.S.C. 6421(a)(2) and (3) (2000 & Supp. II 2002) ("institutionalization" includes "correctional facilities"); 42 U.S.C. 5633(a)(9)(A) and (F)(i) (2000 & Supp. II 2002) ("institutionalization" of juvenile delinquents); 29 U.S.C. 701(a)(5); *Yeskey*, 524 U.S. at 209 (Title II "unmistakably includes State prisons and prisoners within its coverage").

Court to disregard "the stuff of actual experience" that prompted congressional action, *United States* v. *Gainey*, 380 U.S. 63, 67 (1965), and constrain its review to an artificial subset of judicially depurated material. Not one of respondents' proposed rules for disallowing actual experience comports with controlling precedent or common sense.[3]

First, respondents insist (Br. 35) that the Court must disregard all evidence of unconstitutional treatment by political subdivisions of the States. *Lane*, in which both respondents had been denied access to "county courthouses," 541 U.S. at 513-514, held the opposite, *id.* at 527 & n.16.

Respondents rely (Br. 35) on the statement in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 369 (2001), that evidence of discrimination by local units of government should be discounted because Congress may subject them to damages suits without relying on its Section 5 power. But *Lane* distinguished *Garrett* on this point, noting that a rule disallowing evidence involving local government officials could not be reconciled with *South Carolina* v. *Katzenbach*, 383 U.S. 301, 312-315 (1966), or *Hibbs*. See *Lane*, 541 U.S. at 527-528 n.16. In addition, the employment provisions in Title I of the ADA at issue in *Garrett* independently sustainable under the Commerce Clause, so that "the sole purpose of reliance on § 5 [was] to place the States on equal footing with private actors with respect to their amenability to suit." *Id.* at 528 n.16. Title II, by contrast, specifically focuses on the operations of state and local governments *qua* governments. Moreover, respondents and numerous other States have argued that Title II is not proper Commerce Clause legislation as applied to prisons, *Miller*, 384 F.3d at 1268 n.23; Nevada, Georgia, *et al.* Amicus Br. at 7-8, *Pennsylvania Dep't of Corrs.* v. *Yeskey*, (No. 97-634). This case thus draws into question the *substantive*

---

[3] To the extent the Court considers it relevant, the appendix to this brief contains a case-by-case response to respondents' appendix.

power of Congress to remedy and deter a documented pattern of unconstitutional treatment of disabled inmates by both States and local governments, regardless of whether the law is enforced through private damages actions, private injunctive actions, or by the United States itself. That makes the actions of local governments clearly relevant. See *Lane*, 541 U.S. at 527-528 n.16; *City of Boerne* v. *Flores*, 521 U.S. 507, 530-531 (1997); *South Carolina*, 383 U.S. at 308-313 (1966).

Finally, respondents' effort to distinguish *Lane* on this point fails for the additional reason that local jails, like local courthouses, often serve as arms of the state, and the interchange of prisoners and shared use of facilities between state and local authorities is commonplace. See U.S. Br. 18 n.9. Under those circumstances, Congress's enforcement power under Section 5, like the substantive protections of Section 1, can charge the States with some responsibility for the unconstitutional conduct of the political subdivisions that the States themselves created and empowered to act, and with which they coordinate prison programs and services.

Second, respondents variously complain (Br. 25-26, 30-31) that the testimony, reports, studies, and cases that substantiate the problem of unconstitutional treatment of disabled prisoners came either too early or too late. *Lane* and *Hibbs* are to the contrary. In *Lane*, the Court expressly and repeatedly relied on material documenting unconstitutional treatment of the disabled that predated Title II by more than respondents' proposed seven-year cutoff (Br. 26) or postdated its enactment. See 541 U.S. at 524-527 & nn.5-14. For example, two of the cases the Court cited in *Lane* to "document a pattern of unequal treatment in * * * the penal system" postdated the ADA. *Id.* at 525 n.11. The Court did the same in *Hibbs*, relying on cases that predated the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*,

by more than a century and others, like *United States* v. *Virginia*, 518 U.S. 515 (1996), that postdated its enactment, and legislative materials that also ran afoul of respondents' seven-year cutoff. See *Hibbs*, 538 U.S. at 729-730, 733-734 & nn.3, 6-9.

Respondents, moreover, offer no rationale for their proposed head-in-the-sand approach to "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). After all, evidence of unconstitutional treatment spanning a substantial breadth of time would seem to be the very definition of a "history and pattern" of constitutional violations. *Garrett*, 531 U.S. at 368. Moreover, with respect to information that predates the enactment of Title II, it would be an odd conception of federalism that considered Congress's lengthy study of a problem and willingness to proceed incrementally to be marks against the law's constitutionality. With respect to material that postdates Title II's enactment, respondents fail to explain why evidence of an enduring problem does not substantiate Congress's finding of an antecedent problem. Indeed, the fact that violations continue to occur would seem to undermine respondents' argument for discounting pre-enactment evidence, because it demonstrates that earlier laws, and even Title II, have not eradicated the problem.

Third, respondents (Br. 34-35) and Tennessee argue (Amici Br. 14-18) that only final adjudications of constitutional violations by the States can support an exercise of Congress's Section 5 power, and even then only if there are sufficiently numerous adverse court judgments to meet some unspecified adjudications-per-capita threshold (*id.* Br. 17-18), and if the legislation is targeted solely at adjudicated offending States (*id.* at 17). That argument is irreconcilable with precedent. The Court, for example, upheld *nationwide* bans on literacy tests and durational residency require-

ments after the Court had repeatedly affirmed the constitutionality of such procedures.[4] Likewise, the Court broadly sustained the Voting Rights Act of 1965 in *South Carolina*, *supra*, even though there were far fewer than "40 cases" finding unconstitutional discrimination in voting, and then only by nine States "over decades" (*id.* 18), making the ratio of violations to the number of eligible African American and other minority voters (*id.* at 17-18) infinitesimally small.[5]

The argument also ignores that the absence of adjudicated violations may reflect the courts' own failure to recognize the problem. See, *e.g.*, *Buck* v. *Bell*, 274 U.S. 200 (1927); see also *Hibbs*, 538 U.S. at 729 (noting that historical discrimination "is chronicled in—and, until recently, was sanctioned by—this Court's opinions"). For example, Congress extended Title VII's ban on gender discrimination to the States, Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972), just four months after, "for the first time in our Nation's history, this Court ruled in favor of a woman who complained that

---

[4] Compare *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding bans), with *Drueding* v. *Devlin*, 380 U.S. 125 (1965) (mem.) (upholding residency requirements); *Carrington* v. *Rash*, 380 U.S. 89, 91 (1965) (same); *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (literacy test upheld).

[5] We have found only 18 final judgments of unconstitutional voting discrimination by the States before 1965. See *Anderson* v. *Martin*, 375 U.S. 399 (1964); *Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Lane* v. *Wilson*, 307 U.S. 268 (1939); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Myers* v. *Anderson*, 238 U.S. 368 (1915); *Guinn* v. *United States*, 238 U.S. 347 (1915); *Alabama* v. *United States*, 304 F.2d 583 (5th Cir.), aff'd, 371 U.S. 37 (1962); *McDonald* v. *Key*, 224 F.2d 608 (10th Cir.), cert. denied, 350 U.S. 895 (1955); *Butler* v. *Thompson*, 184 F.2d 526 (4th Cir. 1950); *Baskin* v. *Brown*, 174 F.2d 391 (4th Cir. 1949); *Rice* v. *Elmore*, 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948); *Chapman* v. *King*, 154 F.2d 460 (5th Cir.), cert. denied, 327 U.S. 800 (1946); *Bliley* v. *West*, 42 F.2d 101 (4th Cir. 1930); *Hamm* v. *Virginia State Bd. of Elections*, 230 F. Supp. 156 (E.D. Va.), aff'd, 379 U.S. 19 (1964); *United States* v. *Louisiana*, 225 F. Supp. 353, 396 (E.D. La. 1963), aff'd, 380 U.S. 145 (1965); *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.), aff'd, 336 U.S. 933 (1949).

her State had denied her the equal protection of its laws" in a non-employment case. *Virginia*, 518 U.S. at 532 (citing *Reed* v. *Reed*, 404 U.S. 71 (1971)). Title VII's legislative record contains no specific data or findings regarding women employees in state or local governments,[6] and we have uncovered only *one* case before 1972 that actually found unconstitutional employment discrimination on the basis of gender by a State. See *Thorn* v. *Richardson*, No. 9577, 1971 WL 201 (W.D. Wash. 1971).

Respondents' and their amici's approach also would require overruling *Hibbs*. There, the Court rejected the dissent's emphasis on Nevada's own benefit policies, which predated the federal enactment, and instead found that Congress "could reasonably conclude" that nationwide remedial legislation was justified, "no matter how generous petitioner's own [policies] may have been." 538 U.S. at 734.[7] The Court reached that conclusion, moreover, despite the

---

[6] See H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971); S. Rep. No. 415, 92d Cong., 1st Sess. (1971); 118 Cong. Rec. 1840 (1972) (Sen Javits) (only "overall figures" for sex discrimination); *id.* at 1816-1819; *id.* at 4935. The isolated references to gender discrimination noted only that the Constitution prohibits such discrimination, S. Rep. No. 415, *supra*, at 10; 118 Cong. Rec. at 1816 (Sen. Williams); *id.* at 1412 (Sen Byrd). Congressional hearings on the 1972 amendments were equally silent. See *Equal Employment Opportunities Enforcement Act of 1971: Hearings on S. 2215, S. 2617, & H.R. 1746 Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare*, 92d Cong., 1st Sess. (1971); *Equal Employment Opportunity Enforcement Procedures: Hearings on H.R. 1746 Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor*, 92d Cong., 1st Sess. (1971); *Equal Employment Opportunity Enforcement Procedures: Hearings on H.R. 6228 & H.R. 13517 Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor*, 91st Cong., 1st & 2d Sess. (1969-1970); *Equal Employment Opportunities Enforcement Act: Hearings on S. 2453 Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare*, 91st Cong., 1st Sess. (1969).

[7] See also *Lopez* v. *Monterey County*, 525 U.S. 266 (1999); *City of Rome* v. *United States*, 446 U.S. 156, 174 (1980).

dearth of adverse final judgments against States for unconstitutional family-leave policies.

Further amici's adjudicated-violations-per-capita approach cannot be squared with the original purpose of Section 5, which was not to leave the protection of liberties so completely dependent upon the same federal judiciary that, less than a decade earlier, had constricted congressional power to contain the spread of slavery, see *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 436-452 (1857), or to relegate Congress to enforcing only those rights that the courts were already doing a good job of policing. Under Section 5, "[i]t is not * * * the *judicial power*" but "the power of Congress which has been enlarged." *Ex parte Virginia*, 100 U.S. 339, 345 (1879). Amici's argument also overlooks that a single case against a State (especially a class action) may expose hundreds of constitutional violations, the worst offending cases may settle, and a central purpose of Section 5 legislation is to remedy and prevent the forms of discrimination that are least amenable to courtroom proof, *e.g.*, *Hibbs*, 538 U.S. at 736.[8]

In short, respondents' focus (Br. 30) on the materials before Congress "in 1990" asks the wrong question. The appropriateness of Section 5 legislation turns upon whether a problem of unconstitutional treatment exists, not whether a long series of widely dispersed judicial adjudications or an elaborate legislative history exists.

Fourth, respondents criticize (Br. 23-24) the lack of specificity in the testimony of a single witness before Congress, Cindy Miller of Massachusetts, who testified that

---

[8] The insistence upon final judgments loses sight of the fact that a preliminary injunction reflects the prisoner's "substantial likelihood of success on the merits," *Benten* v. *Kessler*, 505 U.S. 1084, 1085 (1992) (per curiam), and a denial of summary judgment means that a reasonable factfinder—whether a judge, jury, or Congress—could find unconstitutional treatment of the prisoner, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986).

"jailers rational[ize] taking away [inmates'] wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." Respondents insist that the "rehabilitation counselor['s]" testimony must have referred to the treatment of residents in a state mental health hospital rather than in a state prison. But it is not clear that respondents' purported distinction is even meaningful. "[R]ehabilitation counselor[s]" routinely work in correctional facilities as well as mental health institutions, see, *e.g.*, *Spicer* v. *Virginia, Dep't of Corrs.*, 66 F.3d 705, 707 (4th Cir. 1995) (en banc), and in many States (including Massachusetts), mentally ill prisoners may serve their sentences within mental health institutions.[9]

In addition, even if that *one* witness's testimony were ambiguous, it would not alter the very specific judicial confirmation of the same point (including a Massachusetts case)[10] and the sheer volume of other evidence of unconstitutional treatment. Respondent and their amici simply ignore

---

[9] See U.S. Br. 32 n.27; Mass. Gen. Laws Ann. ch. 123, §§ 1, 13, 14, 18 (West 2003); Reply App., *infra*, 4a, 8a, 11a, 23a; *Vitek* v. *Jones*, 445 U.S. 480 (1980); John Monahan, et al., "Prisoners Transferred to Mental Hospitals," in *Mentally Disordered Offenders: Perspectives from Law and Social Science* 233-244 (John Monahan & Henry J. Steadman eds., 1983).

[10] See *Navedo* v. *Maloney*, 172 F. Supp. 2d 276 (D. Mass. 2001) (prisoner denied access to his wheelchair); see also *Serrano* v. *Francis*, 345 F.3d 1071 (9th Cir. 2003) (inmate in disciplinary unit denied wheelchair, forcing him to crawl around vermin and cockroach-infested floor), cert. denied, 125 S. Ct. 43 (2004); *Hicks* v. *Frey*, 992 F.2d 1450 (6th Cir. 1993) (paraplegic in disciplinary unit denied wheelchair); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) ("squalor in which [prisoner] was forced to live as a result of being denied a wheelchair" violated the Eighth Amendment); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) (inmate deprived of wheelchair); *Beckford* v. *Irvin*, 49 F. Supp. 2d 170 (W.D.N.Y. 1999) (Eighth Amendment violated by same); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around cell); cf. *Parkinson* v. *Columbia County Dist. Att'y*, 679 N.Y.S.2d 505 (Sup. Ct. 1998) (Constitution violated where inmate was deprived of prosthetic leg for at least a year).

the evidence that (i) persons with disabilities are "deprived of medications while in jail," H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 3, at 50 (1990); (ii) "Kentucky Corrections offers no appropriate treatment to the retarded and subjects them to varied institutional abuse";[11] (iii) "[m]edical care at best in most State systems barely scratches the surface of constitutional minima";[12] (iv) inmates with the most serious medical problems "get dumped" into higher security facilities regardless of whether their crimes or behavior warrant it;[13] (v) "the confinement of inmates who are in need of psychiatric care and treatment * * * in the so called psychiatric unit of the Louisiana State Penitentiary constitutes cruel and unusual punishment in violation of the Eighth Amendment";[14] (vi) mentally ill prisoners were deprived of nutritional food because "mental cases don't know what they eat anyway";[15] and (vii) there have been repeated instances of deliberate abuse and gross medical maltreatment causing dangerous infections, maggot-infested wounds, and the deaths of disabled inmates, see U.S. Br. 24-

---

[11] Kentucky Legis. Research Comm'n, *Research Report No. 125: Mentally Retarded Offenders in Adult and Juvenile Correctional Institutions* at A-3 (1975).

[12] *AIDS and the Admin. of Justice: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 39 (1987).

[13] Cathy Potler, Correctional Ass'n of N.Y., *State of the Prisons: Conditions Inside the Walls* 12-13 (1986); see J.A. 90; U.S. Br. 28-29.

[14] *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 & H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 320-321 (1977).

[15] *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 234 (1977) (*S. 1393 Hearings*).

25 & n.19. With respect to that evidence, the silence of respondents and their amici speaks volumes.[16]

3. ***The type of violations warrants congressional action.*** Rather than answer that extensive evidence—the volume and specificity of which far exceeds the records in *Lane* and *Hibbs*—respondents argue (Br. 10-19) that it must all be ignored because the constitutional claims of prisoners are subjected to rational-basis review. The premise is wrong. The rights of disabled prisoners to adequate medical care, humane conditions of confinement, protection from violence, and prison terms that are not lengthened or served under inordinately harsh conditions, see J.A. 90; U.S. Br. 21-30, are protected by more than the any-conceivable-rational-basis standard. Furthermore, prisoners have a "fundamental constitutional right of access to the courts" to challenge their convictions or conditions of confinement, *Lewis* v. *Casey*, 518 U.S. 343, 346 (1996), and the Constitution's protection of that right is at least as robust as the general public's (*i.e.*, *Lane* respondent Jones's) right to observe court proceedings. Indeed, because prison administration is an area in which the "government exerts a degree of control unparalleled in civilian society," *Cutter* v. *Wilkinson*, 125 S. Ct. 2113, 2121 (2005), and deprives disabled inmates of the resources, freedom, and physical capacity to meet their own needs, the Constitution's attentiveness to state conduct is heightened and pervasive.

Respondents' reliance (Br. 14-19) on *Turner* v. *Safley*, 482 U.S. 78 (1987), misunderstands the operation of both

---

[16] Respondents' search (Resp. Br. 24 & n.8) of Westlaw's (incomplete) computerized legislative history of the ADA reveals the pitfalls of artificially narrow, word-specific search requests. Respondents failed to look for the terms Congress employed. Had they searched for "jail," "inmate," or "correctional," they would have found the specific consideration of Title II's application to prison administration that they seek. See U.S. Br. 21-23, 28; 136 Cong. Rec. 17,039 (1990) (reproducing federal Bureau of Prisons' guidance on the management of HIV-positive prison inmates).

that standard and Title II. As this Court underscored just last Term, the *Turner* standard of review applies "*only* to rights that are inconsistent with proper incarceration." *Johnson* v. *California*, 125 S. Ct. 1141, 1149 (2005). Moreover, even when *Turner* calls for deference, it provides for more searching review than rational-basis scrutiny, as *Turner* itself demonstrates, see 482 U.S. at 94-99 (striking down marriage restrictions). Title II, moreover, does not mandate the creation of new programs or services. It requires only that qualified individuals with disabilities be afforded equivalent access to whatever programs and services the prison already offers, 42 U.S.C. 12132. When the State determines that certain accommodations of constitutional rights are perfectly consistent with incarceration, but makes them unavailable to qualified inmates with disabilities, the State's action is not saved by *Turner*. Indeed, in that context, the judgments for which *Turner* suggests that deference is appropriate will rarely be implicated. Likewise, the Court's Eighth Amendment jurisprudence recognizes that the pervasive control the State exercises over prisoners imposes unique affirmative duties on the States and does not broadly permit the State to engage in any conduct for which a rationale could be hypothesized.

Respondents' argument also misunderstands the function of deferential judicial scrutiny under *Turner*. *Turner* recognizes that state action implicating and possibly violating the Constitution is pervasive in prisons, but nevertheless prescribes a measure of judicial restraint in evaluating prison policies out of concerns for both federalism and the separation of powers. However, both of those concerns have substantially reduced force when Congress acts under Section 5 of the Fourteenth Amendment. Further, to transform *Turner*'s expression of judicial restraint and respect for the legislative process into a judicial sword that would preclude Congress from responding, under Section 5 of the Four-

teenth Amendment, even to a proven record of constitutional violations would get the Constitution's structural principles exactly backwards.

4. ***Title II is not underinclusive***. Respondents contend (Br. 27-29, 31-33) that the extensive evidence of violations of disabled inmates' Eighth Amendment rights must be discounted because the States were simultaneously violating the constitutional rights of non-disabled inmates, rendering Title II "underinclusive[]" (*id.* at 44). That argument largely answers itself. It would be an odd version of federalism that deemed a congressional response to only one species of constitutional violations to be suspect, or that allowed States to insulate themselves from targeted Section 5 legislation by violating an even broader swath of constitutional rights. Congress, moreover, could reasonably conclude that Eighth Amendment violations disproportionately endanger the lives and physical safety of inmates with disabilities, given their often enhanced vulnerability to prison conditions in general, and to the deprivation of adequate medical care in particular. Congress, likewise, could (and did) conclude that the unconstitutional treatment of *inmates* with disabilities was an integral part of the broader problem of the States' improper treatment of *Americans* with disabilities.

Respondents' companion argument (Br. 27-29) that Title II is unconcerned with Eighth Amendment violations because they are not a form of "discrimination" is without basis. The concepts of inequitable treatment and inhumane treatment overlap. When prison officials deny inmates with disabilities access to toilet facilities or subject them to a substandard diet because "mental cases don't know what they eat anyway," *S. 1393 Hearings* 234, they discriminate against disabled inmates with respect to the minimal conditions guaranteed by the Eighth Amendment. Indeed, this Court held in *Lane* that Title II enforces not just the constitutional prohibition on "irrational disability discrimination,"

but also remedies and prevents violations of "other basic constitutional guarantees." 541 U.S. at 522 (citing cases implicating Eighth Amendment rights). And that aspect of Title II added to, rather than detracted from, its constitutionality. Beyond that, respondents' observation (Br. 22-23) that Title II promotes mainstreaming overlooks that (i) Congress also unambiguously expressed its desire to combat discrimination in "institutionalization," 42 U.S.C. 12101(a)(3); *Yeskey*, *supra*; (ii) Title II promotes the mainstreaming of disabled prisoners within prison life; and (iii) the vast majority of disabled inmates "will eventually return to society," *McKune* v. *Lile*, 536 U.S. 24, 36 (2002) (plurality), so that their inclusion in prison rehabilitative programs and other institutional services directly promotes their later transition into the mainstream of community life.

C. Title II Is Reasonably Tailored To Remedying And Preventing Constitutional Violations in the Prison Context

Respondents contend (Br. 38-44) that Title II is not congruent and proportional because it goes too "far beyond the Constitution s requirements" (Br. 40). As an initial matter, that argument is hard to reconcile with respondents' complaint elsewhere (Br. 27-29, 31-33, 44) that Title II is "underinclusive" because it does not address more constitutional violations committed by the States.

In any event, while some applications of Title II might provide stronger procedural and substantive protection than the Constitution mandates, Section 5 permits that. "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). Rather, Congress may both remedy past violations of constitutional rights and enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Hibbs*, 538 U.S. at 727-728.

Respondents and their amici also fail to show that the gap between the Constitution and Title II as applied to prisons is materially different from the gap between Title II and the various constitutional rights of access to the courts upheld in *Lane*. The features of Title II that this Court emphasized in upholding its application to the courts apply with full force in the prison context. Title II does not impose inflexible commands, but rather requires only that States undertake "reasonable measures," *Lane*, 541 U.S. at 531, and "reasonable" accommodations and modifications, *id.* at 532; 42 U.S.C. 12131(2), to ensure only that otherwise "qualified individual[s]" with disabilities, 42 U.S.C. 12132, be afforded reasonable access to programs and services that the State independently has determined are consistent with incarceration. Title II does not require States to abandon their essential eligibility criteria for prison programs, to "fundamentally alter the nature of the service provided," or to incur "undue financial or administrative burden[s]." *Lane*, 541 U.S. at 532; 28 C.F.R. 35.130(b)(7), 35.150(a)(3). Those requirements echo the general mandate of "reasonableness" in prison regulations, *Turner*, 482 U.S. at 89; and the States' obligations to refrain from imposing "atypical and significant hardship[s]," *Wilkinson* v. *Austin*, 125 S. Ct. 2384, 2395 (2005), and to provide "humane conditions of confinement," "adequate food, clothing, shelter, and medical care," and "reasonable measures to guarantee [prisoners'] safety," *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994).

Indeed, Title II's flexible commands are, if anything, a more reasonable and "appropriate response to [a] history and pattern of unequal treatment," *Lane*, 541 U.S. at 530, in the prison context than in the court-access context. First, to the extent Title II imposes affirmative duties of accommodation on States, those duties are more congruent and proportional within prison walls, where (unlike most other contexts) affirmative obligations under the Constitution

itself are the rule, rather than the exception. See, *e.g.*, *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989). Second, courts have been particularly receptive to the need to provide an appropriate degree of deference to prison officials, even in applying statutory and constitutional standards that are facially more rigorous. See, *e.g.*, *Cutter*, 125 S. Ct. at 2123, *Johnson*, 125 S. Ct. at 1152. And a number of courts have recognized that Title II's terms permit reasonable deference to prison administrators.[17] If doubt remains, courts should construe Title II to preserve its constitutionality. *E.g.*, *Harris* v. *United States*, 536 U.S. 545, 555 (2002); *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

Furthermore, Title II's standards, see 42 U.S.C. 12134(b), largely mirror those that the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. II 2002), imposes upon the federal government, which operates the largest correctional system in the Nation, and all fifty States, which have voluntarily chosen to accept federal funding that triggers that Act's requirements. If those standards failed to accord sufficient deference to the unique needs of the prison context or if, in fact, they "mark[ed] the end of deference to State prison operations" that amici portend (Tenn. Br. 6), then presumably some evidence of those problems would have surfaced in the federal system or in the States in the decades since the Rehabilitation Act and Title II were en-

---

[17] See *Bowman* v. *Beasley*, 8 Fed. Appx. 175, 179 (4th Cir. 2001) (per curiam) ("wide deference"), cert. denied, 535 U.S. 1001 (2002); *Armstrong* v. *Davis*, No. 99-15152, 2000 WL 369622, at *1 (9th Cir. Apr. 11, 2000) (mem.) (*Turner*-style deference); *Oneisha* v. *Hopper*, 171 F.3d 1289, 1300 (11th Cir. 1999) (en banc) (deferring to "penological concerns"), cert. denied, 528 U.S. 1114 (2000); *Randolph* v. *Rodgers*, 170 F.3d 850 (8th Cir. 1999); *Couvillion* v. *Michigan Parole Bd.*, No. 4:04-CV-130, 2005 WL 1036973, at *6 (W.D. Mich. May 4, 2005); *Brooks* v. *Horn*, No. 00-03637, 2004 WL 764385, at *9 (E.D. Pa. Apr. 7, 2004); see also *Gates* v. *Rowland*, 39 F.3d 1439, 1447 (9th Cir. 1994) (applying *Turner*-style deference under Section 504 of the Rehabilitation Act).

acted.[18] But neither respondents nor their amici cite any and, in fact, they all continue to accept federal funding for their prisons. All Title II does is extend those workable standards to every level of correctional facility and to each prisoner with a qualifying disability within a State.

Amici's concern (Br. 26) that Title II will "spur more prison litigation" suffers from the same flaws. Indeed, just last Term, the Court rejected the identical argument with respect to the protections for prisoners' religious freedom required by the Religious Land Use and Institutionalized Persons Act—protections that can potentially be invoked by *every* prisoner and that subject state justifications to statutory *strict scrutiny*, 42 U.S.C. 2000cc-1(a)(1) and (2). In *Cutter*, the Court saw "no reason to anticipate that abusive prisoner litigation will overburden the operations of state and local institutions," and noted that the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e, was "designed to inhibit frivolous filings." 125 S. Ct. at 2124-2125. In fact, while the State of Washington now joins a brief labeling the PLRA a "facile assurance" (Tenn. Br. 25), Washington took a decidedly different view last Term when it told this Court that frivolous prisoner suits are "best addressed through legislation like the PLRA," rather than the denial of substantive civil rights protection. New York & Washington Amicus Br. at 16, *Cutter* v. *Wilkinson* (No. 03-9877). If, as Washington argued last year (*id.* at 2-3, 15), RLUIPA's *strict scrutiny* standard is a workable and appropriately deferential standard for accommodating religion in prisons, it is hard to understand the insistence this year that Title II's *reasonableness* standard is an unworkable standard for accommodating disabilities (unless accompanied by federal

---

[18] Every State receives federal funding for its prisons. See *Cutter*, 125 S. Ct. at 2118-2119 n.4; *FY 2004 Office of Justice Programs, Office on Violence Against Women & Office of Community Oriented Policing Services: Grants by State* (visited Oct. 26, 2005) <http://www.ojp.gov/ fy2004grants>.

funding, at which point the standard apparently becomes acceptable again).

Finally, amici argue (Br. 24-25) that allowing damages is not appropriate. But amici make no effort to explain why damages here—which echo the damages relief already available against States under the Rehabilitation Act, *Barnes* v. *Gorman*, 536 U.S. 181, 184-187 (2002)—are less appropriate than they were under Title II in *Lane*, or under the Family and Medical Leave Act in *Hibbs*, 538 U.S. at 740. The "gravity of the harm" that past violations have caused, *Lane*, 541 U.S. at 523 —some of which have led to the physical suffering and deaths of prisoners, see U.S. Br. 24-29 & Add. A and B—strongly counsels in favor of equivalent enforcement authority in this context. Indeed, this Court has held that damages are an appropriate remedy to address the violation of constitutional rights in the cause of action created by *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971). *A fortiori*, it is appropriate for Congress to make that same judgment in exercising its Section 5 power.

* * * * *

For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

OCTOBER 2005

REPLY APPENDIX

Detailed Annotation of Cases Evidencing the Problem of Unconstitutional Treatment of Individuals with Disabilities in Correctional Facilities

Case	Respondents' Assertions	United States' Response
Balla v. *Idaho State Bd. of Corrs.*, 595 F. Supp. 1558 (D. Idaho 1984)	• Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination.	• See U.S. Reply Br. at 15-16. • Court observed that psychiatric care at prison was "almost nonexistent," 595 F. Supp. at 1568, and that "the attitude of the Department with regard to psychiatric care can be described as deliberately indifferent," *ibid.*, with little or no care given to inmates with serious mental illnesses, *id.* at 1569. Failure to provide needed diet to diabetic had contributed to rendering him blind, *id.* at 1574-1575, and had contributed to another prisoner's seizures and to another's hospitalization for relapse of Crohn's Disease, *ibid.*

Case	Respondents' Assertions	United States' Response
Battle v. *Anderson*, 376F. Supp. 402 (E.D. Okla. 1974), aff'd in part and rev'd in part on other grounds, 993 F.2d 1551 (10th Cir. 1993) (reversing only as to district court's denial of two motions to intervene)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Inmates' claims of deficient prison conditions swept much more broadly than mental health care, encompassing issues such as law library access and religious practice. Deficiencies in medical care were systemic. Court denied money damages.	• See U.S. Reply Br. at 15-16. • The court specifically noted that half of the prison's in-patient population was hospitalized for psychiatric reasons, that "there is no professional psychiatric staff available for treatment on a regular basis," and the "only treatment" is "sedation." 376 F. Supp. at 415. The court's injunction included detailed provisions concerning medical care. See *id.* at 434.
Bee v. *Greaves*, 744 F.2d 1387 (10th Cir. 1984), cert. denied, 469U.S. 1214 (1985)	• Not decided on the merits. • County jail. • Inmate's forcible-medication claim arose after he initially requested medication. Court held that liberty interest in avoiding unwanted treatment is not absolute.	• See U.S. Reply Br. at 5-6, 7-10, 15-16; *Tennessee* v. *Lane*, 541 U.S. at 527-528 n.16. • Regardless of the fact that the inmate initially demanded medication, the issue was whether forcibly medicating him later was a non-exaggerated response to an emergency situation, 744 F.2d at 1395-1397, and the court found that the evidence in the inmate's favor was sufficient to defeat summary judgment, *ibid.*

Case	Respondents' Assertions	United States' Response
Bonner v. *Arizona Dep't of Corrs.*, 714 F. Supp. 420 (D. Ariz. 1989)	• Not decided on the merits. • Court rejected plaintiff inmate's argument that he had a due process liberty interest in avoiding protective lockdown.	• See U.S. Reply Br. at 7-10. • While the court held that the deaf, mute, and vision-impaired plaintiff had no due process liberty interest in avoiding protective lockdown, it also held that the plaintiff had a constitutional interest in not being removed from the prison's honor dorm. 714 F. Supp. at 424-425. Court found a genuine issue of material fact as to whether "requir[ing] a deaf, mute, and vision-impaired inmate to navigate this legal miasma without a qualified interpreter" prevented him from understanding the disciplinary proceedings that removed him from the dorm. *Id.* at 425; see *id.* at 423.
Bonner v. *Lewis*, 857 F.2d 559 (9th Cir. 1988)	• Not decided on the merits. • Court affirmed grant of summary judgment to defendant on inmate's equal protection and Eighth Amendment claims.	• See U.S. Reply Br. at 7-10. • Though affirming the dismissal of certain of the inmate's claims, the court made clear that a genuine issue of material fact existed as to "whether the denial of a qualified sign language interpreter prevented [the inmate] from understanding the charges against him or presenting his views," 857 F.2d at 565, and it remanded for determination of whether the Due Process Clause had thus been violated, *ibid.*

Case	Respondents' Assertions	United States' Response
Burchett v. *Bower*, 355 F. Supp. 1278 (D. Ariz. 1973)	• Court contemplated that inmate receiving psychiatric treatment in state mental hospital could have his treatment terminated and be returned to prison.	• Although the court found it unnecessary to address the constitutional right to treatment, it noted the uncontradicted testimony that the plaintiff was mentally ill and that no psychiatric treatment was available at the prison, 355 F. Supp. at 1281, and it enjoined defendants from transferring the inmate back to the prison without affording him due process, see *id.* at 1281-1283. The court also enjoined "any future unconstitutional application of the statute to Burchett," *id.* at 1282.
Cody v. *Hilliard*, 599 F. Supp. 1025 (D.S.D. 1984), aff'd in part and rev'd in part on other grounds, 830 F.2d 912 (8th Cir. 1987) (en banc) (appeal did not encompass portion of district court's order dealing with medical and psychiatric care), cert. denied, 485 U.S. 906 (1988)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Eighth Circuit later reversed court's holding that double-celling was unconstitutional. Court held that provisions for inmates' special dietary needs were adequate.	• See U.S. Reply Br. at 15-16. • Though also addressing other deficiencies in prison conditions, the court found that inmates with "serious psychiatric needs" were not being treated by qualified medical personnel; it concluded that mental health care was "an especially grave deficiency" at the prison. 599 F. Supp. at 1058-1059.

Case	Respondents' Assertions	United States' Response
Cortes-Quinones v. *Jiminez-Nettleship*, 842 F.2d 556 (1st Cir. 1988), cert. denied, 488 U.S. 823 (1988)	• Non-disabled inmates subjected to conditions like Goodman's. • District jail. • Schizophrenic prisoner was killed by other inmates, not by state officials. Prison was generally overcrowded. No claim of discrimination against decedent.	• See U.S. Reply Br. at 5-6, 15-16; *Lane*, 541 U.S. at 527-528 n.16. • Though the schizophrenic inmate died at the hands of fellow inmates, the court upheld a jury finding that, by transferring him to the overcrowded jail where he was killed and leaving him "unsegregated and without treatment for his psychological problems for nearly four months," Puerto Rico prison officials exhibited deliberate indifference to his health and safety. 842 F.2d at 559-560.
Cummings v. *Roberts*, 628 F.2d 1065 (8th Cir. 1980)	• Not decided on the merits. • County jail. • Inmate was not disabled when taken into custody, but suffered back injury while in detention.	• See U.S. Reply Br. at 5-6, 7-10; *Lane*, 541 U.S. at 527-528 n.16. • The court reversed summary judgment for the defendants not only on the inmate's claim of deliberate indifference to his medical needs, but also on his claim that prison officials' failure to give him a wheelchair made it necessary for him to crawl on the floor. 628 F.2d at 1068.
Delafose v. *Manson*, 385 F. Supp. 1115 (D. Conn. 1974)	• Claim at issue was more similar to Title I employment-discrimination claim: inmates hospitalized for physical ailments received "hospital pay" while inmates hospitalized for mental ailments did not.	• The court held that disparate treatment of the two groups amounted to irrational discrimination against mentally ill patients; the situation is not analogous to employment discrimination because members of neither group were working. 385 F. Supp. at 1116-1121.

Case	Respondents' Assertions	United States' Response
Doe v. *Coughlin*, 697 F. Supp. 1234 (N.D.N.Y. 1988)	• Not decided on the merits. • Court decided the case on privacy grounds and noted that the same challenge had been rejected when brought under the Fourteenth Amendment.	• See U.S. Reply Br. at 7-10. • Though observing that other constitutional challenges to similar plans had failed, the court was unequivocal that involuntary placement of an inmate in a dormitory designated for HIV-positive individuals—and thus involuntary disclosure of the inmate's HIV-positive status—violated his constitutional right to privacy, see 697 F. Supp. at 1236-1241, and that the prison program operated "in a constitutionally impermissible manner," *id.* at 1240. The court determined that "[t]here is no acceptable reason why a prisoner must have his constitutional rights violated particularly in an incomplete program." *Id.* at 1243.

Case	Respondents' Assertions	United States' Response
Duran v. *Anaya*, 642 F. Supp. 510 (D. N.M. 1986)	• Challenge to general prison conditions. • Not decided on the merits. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Preliminary injunction was to prevent certain staff reductions, not to cease continuing constitutional harm. Court addressed harms to the entire prison population, not just disabled inmates.	• See U.S. Reply Br. at 7-10, 15-16. • Though no harm had yet occurred, the court made clear that judicial intervention was necessary to ensure "maintenance of minimal constitutional standards" in the areas of physical and mental health, and that "the level of psychiatric care being provided at this time, particularly to prisoners in need of acute care, is unacceptable by any conceivable measure or standard." 642 F. Supp. at 526. The court noted that current programs "are deficient *even now* in a number of important respects," *ibid.* (emphasis added), and that the impact would be particularly severe for inmates with serious mental health problems, see *id.* at 516, 519.

Case	Respondents' Assertions	United States' Response
Eng v. *Smith*, 849 F.2d 80 (2d Cir. 1988)	• Not decided on the merits. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Court declined to resolve whether problems in prison's mental health system rose to the level of "deliberate indifference" to inmates' medical needs.	• See U.S. Reply Br. at 7-10, 15-16. • Though not deciding whether the "deliberate indifference" standard had been met, the court noted that the evidentiary record supported a finding of "systemic [constitutional] deficiencies" in the prison's mental health system, 849 F.2d at 82, and "deliberate indifference to serious medical needs, *ibid.*
Flakes v. *Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981)	• Suit addressed conditions in a state hospital, not a prison.	• The hospital's population included convicted sex offenders in need of specialized treatment, as well as people convicted of crimes and transferred from prison. 511 F. Supp. at 1326. In addition, the hospital was in the process of conversion to a prison, and the state Division of Corrections shared responsibility for the facility. *Ibid.* The court noted that confinement in a mental institution is "closely analogous to existence in many prisons, and much more stern and dreary than existence in many medium and light security correctional institutions." *Id.* at 1333.

Case	Respondents' Assertions	United States' Response
Inmates of Occoquan v. *Barry*, 717 F. Supp. 854 (D.D.C. 1989)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's. • Court found prison conditions unconstitutionally deficient in numerous respects, going far beyond treatment of disabled people.	• See U.S. Reply Br. at 15-16. • Among a long litany of deficiencies, the court found that, by housing seriously mentally ill inmates in a cell block where they were locked in their cells 23 hours a day and received little treatment, 717 F. Supp. at 863-864, prison officials exhibited "deliberate indifference to their psychiatric health needs," *id.* at 868.
Inmates of the Allegheny County Jail v. *Peirce*, 487 F. Supp. 638 (W.D. Pa. 1980)	• Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • County jail.	• See U.S. Reply Br. at 5-6, 15-16; *Lane*, 541 U.S. at 527-528 n.16. • Court found that the "provision of care to mentally ill inmates * * * is inadequate to the extent of 'deliberate indifference,' " and listed numerous respects in which such care was "far below minimum standards." 487 F. Supp. at 643.

Case	Respondents' Assertions	United States' Response
James v. *Wallace*, 382 F. Supp. 1177 (M.D. Ala. 1974)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination.	• See U.S. Reply Br. at 15-16. • The court refused to dismiss the plaintiffs' claims, specifically noting their allegations that members of the class were "incarcerated in institutions having inadequate facilities and programs designed to meet the treatment and custodial needs of those with mental or emotional difficulties or with geriatric problems." 382 F. Supp. at 1182.
Johnson v. *Hardin County*, 908 F.2d 1280 (6th Cir. 1990)	• County detention center. • Court held that county could not be liable because inmate had produced insufficient evidence of custom or policy of deliberate indifference to medical needs.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • Though holding that the *county* was not liable, the court upheld the jury's finding that jail officials were liable for their deliberate indifference to the inmate's medical needs. 908 F.2d at 1284.

Case	Respondents' Assertions	United States' Response
Kendrick v. *Bland*, 541 F. Supp. 21 (W.D. Ky. 1981)	• Challenge to general prison conditions. • Inmates' suit encompassed a wide variety of prison conditions. Case demonstrates that existing remedies were adequate before ADA, because court required prison to correct certain deficiencies pursuant to Rehabilitation Act.	• See U.S. Reply Br. at 15-16; U.S. Opening Br. at 40-41 (existing laws inadequate); *Lane*, 541 U.S. at 526 & n.15. • The court specifically noted "acts of brutality and cruel and inhuman punishment" committed against inmates suffering from severe mental impairments, 541 F. Supp. at 25, attributing this to guards' lack of "adequate, or apparently any, training in dealing with mentally disturbed inmates," *ibid.* The Rehabilitation Act section of the consent decree addressed only "physical barriers to the handicapped." *Id.* at 40.
Knecht v. *Gilman*, 488 F.2d 1136 (8th Cir. 1973)	• Institution at issue was state hospital, not prison; population included people who had been civilly committed.	• Iowa Security Medical Facility, where inmates were held and received certain drugs involuntarily, included not only civilly committed but also mentally ill inmates from jails. 488 F.2d at 1138.

Case	Respondents' Assertions	United States' Response
Laaman v. *Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Case involved numerous deficiencies in prison conditions. Court's information about prevalence of mental illness came from national statistics.	• See U.S. Reply Br. at 15-16. • Though the court estimated the prevalence of mental illness in the prison based on national statistics, it explained that "[t]his is due at least in part to defendants' failure to adequately diagnose the plaintiff class so that no records exist," and the court also found that "the national statistics reflect the incidence of mental illness at NHSP." 437 F. Supp. at 276 n.1. The prison lacked sufficient personnel to address inmates' "serious mental health care needs." *Id.* at 324.
LaFaut v. *Smith*, 834 F.2d 389 (4th Cir. 1987)	• Federal prison.	• See *Lane*, 541 U.S. at 527-529 nn.16-17; *Hibbs*, 538 U.S. at 730-732 (relying on cases and legislative history concerning federal-government discrimination). • Eighth Amendment was violated when paraplegic inmate was placed in a cell with toilet facilities that he could use only by dragging himself across the floor. 834 F.2d at 392.

Case	Respondents' Assertions	United States' Response
Langley v. *Coughlin*, 715 F. Supp. 522 (S.D.N.Y. 1989)	• Not decided on the merits. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Only a subclass of plaintiffs complained of deficient medical care. Non-disabled inmates complained about being housed with inmates who arguably were disabled.	• See U.S. Reply Br. at 7-10, 15-16. • The court cited evidence of "repeated and systemic failures in the provision of health care services to inmates with very serious mental disorders," 715 F. Supp. at 540, "dramatic failures to meet even minimal professional standards in providing psychiatric services," *ibid.*, and testimony that certain mentally ill inmates may be severely impacted by their proximity to other mentally ill inmates, *ibid.* The court held that the evidence was "ample" to show that the inmates "were injured by a failure to treat [their] serious medical needs," that the "findings would suffice to justify a conclusion that plaintiffs' rights were violated," *id.* at 542, and that state officials were deliberately indifferent, *id.* at 540.
Leach v. *Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989), cert. denied, 495 U.S. 932 (1990)	• County jail.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • Court found policy or custom of deliberate indifference to the needs of paraplegic prisoners, including the plaintiff, who was not bathed regularly and who was forced to sit in his own urine for long periods of time. 891 F.2d at 1243, 1248.

Case	Respondents' Assertions	United States' Response
Lee v. *McManus*, 543 F. Supp. 386 (D. Kan. 1982)	• Not decided on the merits.	• See U.S. Reply Br. at 7-10. • Preliminary injunction granted where paraplegic prisoner's catheter was not cleaned, and where he was forced to sit in bodily waste. 543 F. Supp. at 389-390. The court "wishe[d] to impress upon defendants its distress" at plaintiff's treatment and officials' passivity and complacency in the face of serious medical needs. *Id.* at 392.
Lightfoot v. *Walker*, 486 F. Supp. 504 (S.D. Ill. 1980)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16. • Though addressing the prison's overall health care system, the court noted that "epileptics, diabetics, asthmatics, hypertensives and [inmates with] cardiovascular problems, as well as psychiatrically disturbed inmates," were held in "control cells"; these cells were infrequently observed, such that a prisoner could become ill and die "within minutes," and conditions in the cells were "abysmal." 486 F. Supp. at 511. Court also noted that prison officials had "recklessly failed in their duties to design and implement a mental health care delivery system which is capable of providing minimally required levels of adequate mental health care." *Id.* at 525.

Case	Respondents' Assertions	United States' Response
Littlefield v. *Deland*, 641 F.2d 729 (10th Cir. 1981)	• County jail.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • Finding constitutional inadequacies in the treatment of mentally ill prisoners. 641 F.2d at 732.
Lynch v. *Baxley*, 744 F.2d 1452 (11th Cir. 1984)	• County jails. • This case is not relevant because it was brought by mentally ill individuals incarcerated in county jails while awaiting civil commitment proceedings, but who were not in jail for punishment.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • While the gravamen of plaintiffs' complaint was the fact of their confinement awaiting involuntary civil commitment, the fact remains that this case found unconstitutional treatment in a *prison* setting by *prison* officials, which is an aspect of *prison* administration that Title II addresses. The case cited evidence that mentally ill individuals were kept in unconstitutional conditions. See 744 F.2d at 1460-1461 (prisons were plagued by overcrowding, safety hazards, lack of medical and mental health professionals, and without recreational facilities). Moreover, this case noted that the mentally ill have special requirements that were not met in Alabama prisons. *Id.* at 1458 (citing expert testimony showing that "jail is particularly harmful to those who are mentally ill."). Those unconstitutional conditions would affect all mentally ill prisoners, not just those awaiting civil commitment proceedings.

Case	Respondents' Assertions	United States' Response
Mackey v. *Procunier*, 477 F.2d 877 (9th Cir. 1973)	• Not decided on the merits.	• See U.S. Reply Br. at 7-10. • The evidence in this case "raise[d] serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes" of a mentally ill prisoner. 477 F.2d at 878.
Maclin v. *Freake*, 650 F.2d 885 (7th Cir. 1981)	• Not decided on the merits.	• See U.S. Reply Br. at 7-10. • Paraplegic inmate established a genuine issue of material fact that he was denied access to physical therapy and that prison officials exhibited "deliberate indifference to [his] serious medical needs" that could violate the Eighth Amendment. 650 F.2d at 889.
Mandel v. *Doe*, 888 F.2d 783 (11th Cir. 1989)	• County jail. • Prisoner was injured when jumped off the bed of a work-detail pick-up truck.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • The fact that the inmate's disability was created while he was incarcerated does not diminish (and indeed may enhance) his claim that prison officials were deliberately indifferent to his disability. The evidence presented was that the failure to x-ray and perform surgery on the inmate's leg caused permanent physical impairment. 888 F.2d at 789-790. The Eleventh Circuit found the record "replete with evidence of serious medical need, grossly deficient treatment and callous indifference." *Id.* at 787.

Case	Respondents' Assertions	United States' Response
Maynard v. *New Jersey*, 719 F. Supp. 292 (D.N.J. 1989)	• Dismissed case against State on Eleventh Amendment grounds, but denied motion to dismiss as to prison medical personnel.	• Sufficient evidence of constitutional violations to permit suit against state officials by the parents of a deceased state inmate who alleged that prison officials were deliberately indifferent in failing to diagnose and treat inmate's AIDS, instead offering him only throat lozenges and Tylenol and failing to investigate the cause of his collapse. 717 F. Supp. at 293-294, 296.
Miranda v. *Munoz*, 770 F.2d 255 (1st Cir. 1985)	• District jail.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • Court of appeals reversed grant of a directed verdict to four "supervisory officials in the Puerto Rico correctional system," noting that evidence showed that the deep failings in medical treatment "were as much a matter of central administration policy as of local reaction," such that a reasonable factfinder could hold them responsible. 770 F.2d at 257, 261-262.

Case	Respondents' Assertions	United States' Response
Mitchell v. *Untreiner*, 421 F. Supp. 886 (N.D. Fla. 1976)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's. • County jail.	• See U.S. Reply Br. at 5-6, 15-16; *Lane*, 541 U.S. at 527-528 n.16. • Evidence showed that mentally ill and disabled inmates were subjected to particularly distressing treatment. See 421 F. Supp. at 890 ("The Jail is entirely without medical, nursing, psychological, or dental staff on the premises. Jail personnel with only some first aid training arbitrarily decide whether inmates need medical treatment."); *id.* at 891 ("As many as four or five mentally disturbed inmates at a time are crowded into 'Z' cell. There is no shower in 'Z' cell. Violently ill inmates are likewise crowded into 'Z' cell with other mentally disturbed inmates.").
Mullen v. *Smith*, 738 F.2d 317 (8th Cir. 1984)	• Federal prison.	• See *Lane*, 541 U.S. at 527-529 nn.16-17; *Hibbs*, 538 U.S. at 730, 732.

Case	Respondents' Assertions	United States' Response
Negron v. *Preiser*, 382 F. Supp. 535 (S.D.N.Y. 1974)	• Not decided on the merits. • Court entered injunction to require record-keeping, but refused to find Eighth Amendment violation on current record.	• See U.S. Reply Br. at 7-10. • The court found sufficient evidence of mistreatment of mentally ill inmates in isolation cells, see 382 F. Supp. at 540-541, to issue an injunction to monitor and document the conditions of confinement, *id.* at 542-543 ("Plaintiffs have demonstrated very serious questions going to the merits of this case, and the probability of serious and irreparable harm during the pendency of this litigation.").
Negron v. *Ward*, 458 F. Supp. 748 (S.D.N.Y. 1978)	• Challenge to general prison conditions. • Not decided on the merits. • Due process violation, rather than discrimination on basis of mental illness.	• See U.S. Reply Br. at 7-10, 15-16; *Lane*, 541 U.S. at 522-523. • Court found widespread violations of the due process rights of mentally ill inmates by withholding psychiatric treatment as a form of punishment. 458 F. Supp. at 760-761. The evidence was so strong that good faith immunity was denied. *Id.* at 761-764.

Case	Respondents' Assertions	United States' Response
Nelson v. *Collins*, 455 F. Supp. 727 (D.M.D. 1978), aff'd and remanded sub nom. *Johnson* v. *Levine*, 588 F.2d 1378 (4th Cir. 1978) (remanding only for judicial approval of State's plan to alleviate prison conditions)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16. • The court found Eighth Amendment violations in use of isolation cells, and that some "inmates whose bizarre behavior is the result of mental illness are confined in the isolation area without adequate medical treatment." 455 F. Supp. at 735. Prison ordered to adopt a procedure "by which prompt and adequate medical review and care" is provided, including "psychiatric assistance." *Id.* at 735.

Case	Respondents' Assertions	United States' Response
Newman v. *Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972), aff'd in part, 503 F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination.	• See U.S. Reply Br. at 15-16. • The court stated that "[t]he fate of those many prisoners who are mentally ill or retarded deserves special mention," 349 F. Supp. at 284, and that "[m]ental illness and mental retardation are the most prevalent medical problems in the Alabama prison system, *ibid.* The court found that "the large majority of mentally disturbed inmates receive no treatment whatsoever," and further cited both statistics and specific instances of mistreatment of mentally ill inmates. *Id.* at 284-285. The court also found unconstitutional treatment of physically disabled patients, including wounds that became infested with maggots. *Ibid.* This led the court to conclude that "[i]t is tautological that such care is constitutionally inadequate." *Id.* at 284.
Palmigiano v. *Garrahy*, 443 F. Supp. 956 (D.R.I. 1977)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16. • In addition to general prison conditions, the court specifically noted that the "grossly inadequate system of medical care, including psychiatric care, afforded inmates is part of the intolerable totality of conditions" that violates the Eighth Amendment. 433 F. Supp. at 983.

Case	Respondents' Assertions	United States' Response
Parrish v. *Johnson*, 800 F.2d 600 (6th Cir. 1986)	• Court declined to consider Fourteenth Amendment claim because "the Fourteenth Amendment provides a prisoner with no greater protection than the Eighth Amendment."	• The court determined that the state prison guard violated the Eighth Amendment by engaging in a long series of "deviant acts," including "[c]ausing a prisoner to sit in his own feces, assaulting a prisoner with a knife, extorting food from a prisoner, verbally abusing a prisoner," and failing to provide him with medical care, all of which was "exacerbated by [the prisoner's] paraplegic condition." 800 F.2d at 605. The court declined to consider prisoner's *substantive* due process Fourteenth Amendment claim, finding such rights co-extensive with the Eighth Amendment. 800 F.2d at 604 n.5.
Ramos v. *Lamm*, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16. • In addition to problems in the general condition of the prison and availability of medical care, the court cited expert evidence that 5%-10% of the inmates were "seriously mentally ill," another 10%-25% "need treatment although they are not seriously ill," and "[t]he lack of adequate mental health services * * * contributes to inmate suffering and at times causes suicide and self-mutilation by inmates" sufficient to constitute an Eighth Amendment violation. 639 F.2d at 577-578.

Case	Respondents' Assertions	United States' Response
Ruiz v. *Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), aff'd in part and rev'd in part, 679 F.2d 1115 (5th Cir. 1982) (reversing as to the scope of the district court's remedy, but not as to its finding of constitutionally' deficient medical and psychiatric care), cert. denied, 460 U.S. 1042 (1983)	• Challenge to general prison conditions. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16. • The court cited evidence that 10%-15% of the prison population was mentally retarded and that the failure to protect mentally retarded inmates from abuse and physical harm, as well as the prisoners' inability to understand and participate in prison disciplinary proceedings, violated the Eighth Amendment. 503 F. Supp. at 1346. Moreover, the court determined that the Texas Department of Corrections specifically violated the Eighth Amendment rights of physically disabled prisoners by limiting access to wheelchairs, hearing aids, and other assistive devices, and by refusing wheelchair accessible cells, toilets, and shower facilities. *Id.* at 1340-1343 & nn.153-162. Paraplegic inmate was denied parole for failure to participate in inaccessible work programs. *Id.* at 1341 n.157.
Sites v. *McKenzie*, 423 F. Supp. 1190 (N.D. W. Va. 1976)	• Mentally disabled inmates were seeking treatment equal to that of civilly committed mentally ill, or same treatment as similarly disabled non-prisoners.	• Besides the plaintiff's equal protection claim based on differential treatment of inmates who were civilly committed versus " 'criminally' insane." the court separately found that the state regulation which precluded prisoners in mental institutions from parole eligibility denied them equal protection of the law and was "clear[ly] unconstitutional." 423 F. Supp. at 1194-1195.

Case	Respondents' Assertions	United States' Response
Sykes v. *Kreiger*, 451 F. Supp. 421 (N.D. Ohio 1975)	• Challenge to general prison conditions. • Non-disabled inmates subjected to conditions like Goodman's. • County jail.	• See U.S. Reply Br. at 5-6, 15-16; *Lane*, 541 U.S. at 527-528 n.16. • The court stated that, in addition to concerns regarding the general prison population, "[o]f equal importance and immediate concern to the Court is the plight of psychiatric inmates detained at Cuyahoga County Jail." 451 F. Supp. at 425. The court found the jail had "a crisis evolving from the detention of inmates with advanced mental and emotional disorders" due to the lack of appropriate facilities, psychiatric care, procedures, and personnel. *Ibid.*
Talley v. *Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965)	• Not a claim for disability discrimination, and court only noted that two plaintiffs were forced to perform labor with serious physical handicaps.	• *Lane*, 541 U.S. at 522-523. • The court found that injunctive relief was warranted on behalf of two inmates with "serious physical handicaps" who were required to do work beyond their physical capabilities, 247 F. Supp. at 687, and court "ha[d] no difficulty" finding Eighth Amendment violations, *ibid.* Court also found a lack of needed medical assistance. *Ibid.*

Case	Respondents' Assertions	United States' Response
Thompson v. *City of Portland*, 620 F. Supp. 482 (D. Me. 1985)	• County jail. • Complaint stemmed from events surrounding his arrest, and the court noted that plaintiff was not incarcerated so that the Eighth Amendment did not apply.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • Plaintiff was locked up in a jail cell even after officers learned that "he really is a blind diabetic," and thus no reasonable basis for detention existed. 620 F. Supp. at 485. Case also demonstrates a critical lack of training and attention on the part of law enforcement officers to medical needs. *Id.* at 488 (holding that the State's conduct shocked the conscience, constituting a violation of plaintiff's substantive due process rights).
Tillery v. *Owens*, 719 F. Supp. 1256 (W.D. Pa. 1989), aff'd, 907 F.2d 418 (3rd Cir. 1990)	• Challenge to general prison conditions. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16; *Lane*, 541 U.S. at 527-528 n.16. • Court specifically discussed at length the inadequacy of psychiatric care for mentally ill prisoners, and found that it violated the Eighth Amendment, 719 F. Supp. at 1284-1290, 1302-1306; and that acutely ill psychiatric patients are kept in "medieval conditions" in cells infested with roaches, *id.* at 1288, and "neither the cells nor the inmates are kept clean," *id.* at 1289. Court found serious failures and deliberate indifference in medical care afforded inmates with epilepsy, diabetes, and AIDS, *id.* at 1299-1301, 1305.

Case	Respondents' Assertions	United States' Response
Vitek v. *Jones*, 445 U.S. 480 (1980)	• No claim that prisoners were being involuntarily transferred to mental hospital because of intentional, irrational discrimination.	• *Lane*, 541 U.S. at 522-523. • *Vitek* demonstrates that, besides equal protection concerns, due process considerations are implicated when mentally ill prisoners are transferred or when other changes in the conditions of confinement are made. 445 U.S. at 493-94.
Waldrop v. *Evans*, 681 F. Supp. 840 (M.D. Ga. 1988), aff'd, 871 F.2d 1030 (11th Cir. 1989)	• Court granted summary judgment to nine of the defendants, including high ranking prison administrators, in part, finding that the prison was adequately staffed with medical professionals.	• The court found that the record permitted a reasonable factfinder to conclude that two state officials were deliberately indifferent to plaintiff's serious mental illness. 681 F. Supp. at 853-855.

Case	Respondents' Assertions	United States' Response
Wellman v. *Faulkner*, 715 F.2d 269 (7th Cir. 1983), cert. denied, 468 U.S. 1217 (1984)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16 • In addition to general concerns about the quality and availability of medical care, the court specifically found that the State had not "adequately staffed the psychiatric care component of Michigan City's medical care system," and that there had been no staff psychiatrist for over two years. Defendants' medical expert saw this as "[t]he most obvious serious deficiency in health care at Indiana State Prison" because, "without an on-site psychiatrist there is no one qualified to evaluate and treat psychiatric emergencies such as suicide and homicide candidates, or to follow patients who need to be maintained on long term psychotropic medications." 715 F.2d at 272. Court also found deliberate indifference in provision of colostomy bags. *Id.* at 274.

Case	Respondents' Assertions	United States' Response
Williams v. *Edwards*, 547 F.2d 1206 (5th Cir. 1977)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16. • The parties stipulated that there was "no psychiatric unit, although '[a]pproximately 40% of the inmate population, or 1,360 inmates, would benefit from psychiatric treatment.' An area of the cell block is used to house those for whom in-patient psychiatric care would be appropriate. Those confined to the cell block are under supervision of correctional officers who have no medical training. 'No notes, medical records or observations of the inmates confined to the psychiatric unit are recorded.' The parties conclude this stipulation saying 'The psychiatric unit is totally inappropriate for the confinement of a psychiatric patient.'" 547 F.2d at 1217-1218. Court therefore affirmed district court holding of constitutional violations. *Id.* at 1218.

Case	Respondents' Assertions	United States' Response
Yarbaugh v. *Roach*, 736 F. Supp. 318 (D.D.C. 1990)	• Not decided on the merits. • District of Columbia jail.	• See U.S. Reply Br. at 7-10; *Lane*, 541 U.S. at 527-528 n.16. • District Court found that the prisoner had not had a bath or shower in nine months and received no assistance in changing positions in bed. It therefore determined that "it is clear to the Court that plaintiff is not receiving adequate medical services" for treatment of multiple sclerosis. 736 F. Supp. at 320.
Young v. *Harris*, 509 F. Supp. 1111 (S.D.N.Y. 1981)	• Not decided on the merits.	• See U.S. Reply Br. at 15-16. • Court found an adequate basis for a reasonable factfinder to conclude that the State had violated prisoner's Eighth Amendment rights by failing for over sixteen months to provide him with a leg brace necessary for him to walk. 509 F. Supp. at 1113-1114.